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Supreme Court of the United States

OCTOBER TERM, 1953

No. 25

JACK CORBETT and EL PASO BASEBALL CLUB, INC.,

Petitioners,

v.

ALBERT B. CHANDLER, individually and as Commissioner of Baseball, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Court of Appeals is reported at 202 F. 2d 428 (See R. 20).

Jurisdiction

The Court of Appeals for the Sixth Circuit entered an order on February 20, 1953 affirming the order and judgment below entered on January 25, 1952 dismissing the amended complaint (R. 17) on respondents' motion (R. 15-17) prior to the service of responsive pleading. The peti-

tion for certiorari was filed March 24, 1953 (R. 21), and was granted May 25, 1953 (345 U. S. 963), indicating probable jurisdiction under 28 U. S. C. A., § 1254 (1)).

Statutes Involved

(a) Statutes Giving Jurisdiction:

Sherman Anti-Trust Law, 26 Stat. 209, Par. 1, 15 U. S. C. A., Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

Sherman Anti-Trust Law, 26 Stat. 209, Par. 2, 15 U. S. C. A., Section 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Sherman Anti-Trust Law, 26 Stat. 209, Par. 3, 15 U. S. C. A., Section 3:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. * * *"

Clayton Act, 38 Stat. 731, Sec. 4, 15 U. S. C. A., Section 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

(b) Constitutional Provisions Relied Upon:

Constitution of The United States, Article I, Section 8, par. 3:

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Amendments, Article XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(c) Charter of The United Nations:

Chapter IX:

"Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations

based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"Article 56. All Members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55."

Parties and Background

The petitioners, the plaintiffs, make the following allegations in their amended complaint.

The petitioner, the plaintiff Jack Corbett, is the organizer and owner of the petitioner, the plaintiff, the El Paso Baseball Club, Inc. (hereinafter referred to as "El Paso") (R. 2, 11).

Petitioner, plaintiff, El Paso, is a corporation organized under the laws of Texas and is the owner of the baseball franchise for El Paso in the Arizona Texas League (R. 2, 11).

The organization of the defendants-respondents, is known as "Organized Baseball" and is synonymous with the professional game. It consists of two Major Leagues, The National League and The American League (R. 3);

and the Minor Leagues or National Association of Professional Baseball Leagues, classified into AAA, AA, A, B, C and D Leagues (R. 5). Petitioner El Paso was at all times herein mentioned a part of Organized Baseball by virtue of its membership in a Minor League (R. 13). Organized Baseball is governed by the Major League Agreement, Major League Rules, Major-Minor League Agreement, Major-Minor League Rules and The National Association Agreement (R. 5).

The revenues and profits of Organized Baseball are derived from the following activities. Each Major League carries out a seasonal schedule of games. Each Minor League carries out a similar seasonal schedule. Admission is charged to the public to view the games in the baseball parks (R. 4). The Major League clubs broadcast and telecast the exhibition of the games as they are being played. They derive great revenues by virtue of these activities (R. 4) from advertisers or sponsors of products such as beer, chewing gum, cigarettes, and breakfast foods. In carrying out the schedule of the games, state lines are systematically crossed. In broadcasting and telecasting the waves and beams are sent to almost every hamlet of the United States.

Certain Minor Leagues also broadcast and telecast their games for economic profit and gain (R. 6). Like revenues are also obtained from the playing of the World Series which is a contest between the pennant winners of the two Major Leagues (R. 5). Certain of the winners of the pennants in the Minor Leagues likewise play each other at the end of the season in the Little World Series. During the season, there is an All Star Game consisting of a contest between the star players of the two Major Leagues (R. 5). All of these games, the World Series, the Little World Series and All Star Game, derive large revenues by reason of the broadcast and telecast thereof.

Petitioners allege in their cause of action (R. 14) that the defendants are in violation of the Sherman Anti-Trust Law (26 Stat. 209; 15 U. S. C. A., Sections 1, 2, 3) and the Clayton Act (38 Stat. 731; 15 U. S. C. A., Section 15).

This cause of action alleges that the defendants have entered into a combination and conspiracy in restraint of interstate and foreign commerce and that they have conspired to monopolize professional baseball in the United States and Mexico, thereby depriving petitioners of their right to employ players of Mexican nationality (R. 13-14).

Organized Baseball maintains its monopoly over the exhibition of professional games within its parks and over radio and television for profit in interstate and foreign commerce through its exclusive control over the market for professional players. The players are employed by their respective clubs under uniform contracts. These contracts contain a provision conferring upon the employing club the irrevocable title and right to the player's services whether the player renews his contract or not (R. 13). This reserve clause compels the player's adherence to his club under the sanction of a blacklist (R. 9), and through the reciprocal nature of its binding force pursuant to agreement with an independent League in Mexico (R. 11, 12).

The uniform contract contains an assignment or involuntary transfer clause. This clause permits the Major League clubs to own Minor League clubs or "Farms" and to sell the services of the players on such clubs (R. 6).

Organized Baseball also maintains its monopoly over the owners of franchises in the various leagues by the threat of blacklisting, which is provided for and enforceable under aforesaid governing Agreements and Rules (R. 6) against any violator of these monopolistic regulations. If a club owner is deemed a violator, no professional player can contract with him except on pain of being barred by black-

list from the game. No other club owner can permit his club to take the field against another club owner without being subject to blacklist and permanent expulsion.

Organized Baseball has a Commissioner, who is in effect the titular head of the game.

Petitioners' Story

Against the above background, the petitioners in 1949 signed four players of Mexican nationality to play on the El Paso Club (R. 12). These players were capable and not otherwise disabled from entering into the professional baseball arrangement for profit with the petitioners. It is fairly inferable that petitioners would have reaped an economic gain by virtue of the exhibition of baseball with such Mexican players in their line-up in El Paso by creating interest among the large Mexican population in Texas, as well as interest by Mexican nationals residing in Mexico. Contemplated use of such players' skills would have enhanced the value of petitioners' franchise and with the probable result that a demand for broadcast and telecast of petitioners' games into Mexico would have followed for economic gain.

Early in 1949, defendant Albert B. Chandler, as Commissioner and governing head of Baseball, entered secretly into an agreement with the president of the Mexican National League for the mutual recognition by the National Association of Professional Baseball Leagues and the Mexican National League of the binding force of the right of reservation in the contracts of their respective clubs (R. 11). The Mexican National League had been a competitor of Organized Baseball (R. 8). Petitioners herein acquired the franchise of the El Paso Club in the Arizona-Texas League prior to the aforesaid secret agreement between defendant Chandler and the president of the Mexican National League (R. 11), and did not know of its ex-

istence when they signed four players from clubs in that League and attempted to place a fifth under contract (R. 11, 12). The authority of defendant Chandler to enter into the agreement with the president of the Mexican National League and for defendant George M. Trautman, president of the Minor Leagues, to enforce it against petitioners and others, was established by proceedings within Organized Baseball. Petitioners were deprived of the services of the players whom the corporate petitioner had placed under contract, and the individual petitioner was disciplined for conduct detrimental to Baseball for his continued disregard at the beginning of the season of 1950 of the validity of the reciprocal agreement with the Mexican National League (R. 12, 13). Petitioners exhausted their remedies within Organized Baseball by protest and appeal (R. 12).

The above acts of Organized Baseball, meaning the defendants who fully ratified the agreement of Commissioner Chandler in this respect, deprived petitioners of the opportunity of acquiring the services of five Mexican players under contract and of duly transferring and assigning such contracts for profit or otherwise profiting (see R. 13).

It should be noticed that although Organized Baseball enforced affirmatively the secret Chandler agreement as against petitioners, the Mexican Courts at the instance of a player in the Mexican National League declared the right of reservation in its contracts contrary to The Mexican Constitution and were ready to enforce this decree—from which no appeal was taken—by imprisonment of the owners involved (*Felipe Montemayor* v. *Impulsora Deportiva*, S. A., Central Board of Conciliation and Arbitration of The Northern Territory of Lower California—File No. 73/950, May 30, 1950). Petitioners therefore claim that the structure of Organized Baseball is an unreasonable and unlawful monopoly and has cast them in

damages (Hearings Before The Subcommittee on Study of Monopoly Power of The Committee On The Judiciary, House of Representatives—82nd Congress, First Session, 1301-1303—[hereinafter referred to as "Hearings"]).

In consequence of the injury inflicted upon petitioners in their business by defendants' conspiracy in restraint of trade and their monopoly, petitioners brought this action for treble damages in pursuance of Section 4 of the Clayton Act, 38 Stat. 731, Section 4 (15 U. S. C. A., Section 15), on April 14, 1951 in the United States District Court, Southern District of Ohio, Western Division (R. 1).

The defendants, respondents, moved to dismiss the petitioners' complaint on the grounds that the Court lacked jurisdiction over the subject-matter of the cause of action, and that the complaint failed to state a claim against defendants upon which relief could be granted (R. 15-17).

The District Court granted the defendants' motion and dismissed the plaintiffs' petitioners' action on January 25, 1952 (R. 17). On February 20, 1952, plaintiffs, petitioners, filed notice of appeal to the United States Court of Appeals for the Sixth Circuit from the order of dismissal of the District Court (R. 18). On February 20, 1953, the Court of Appeals affirmed the order of the District Court dismissing petitioners' action (R. 20). This Court granted certiorari on May 28, 1953 (345 U. S. 963), indicating probable jurisdiction.

Question Narrowed by Decision Below

In 1922 this Court decided the case of *Federal Baseball Club* v. *National League*, 259 U. S. 200.

Under somewhat different facts, having to do with the extension of the game to simultaneous sight and sound broadcast and telecast, the case of *Gardella* v. *Chandler*, 172 F. 2d 402, was decided in 1949.

This Court decided in 1922 that Organized Baseball was not engaged in interstate commerce. The Court of Appeals for the Second Circuit decided in 1949 that the extension of the game by broadcast and telecast could be shown to be substantial enough to put Organized Baseball in interstate commerce. *Gardella* v. *Chandler, supra,* 172 F. 2d 402.

At bar, the Sixth Circuit followed verbatim the minority opinion written by Judge Chase in *Gardella* v. *Chandler,* 172 F. 2d 402, at page 403; see R. 20.

The gist of that opinion is this: That in 1922 in *Federal Baseball Club* case, 259 U. S. 200, a small sum of money was paid to the leagues for the right by Western Union to telegraph descriptions of the games if it chose. This fact was not alluded to by this Court, but it was present in the record. The learned Judge Chase held that there was no difference between the sale of the right to telegraph games and the broadcasting of the present day games and telecasting play by play. Nor in the sale of these rights for very substantial sums, together with the advertising of nationally sold products in connection with the simultaneous broadcasting and telecasting. A formula for this reasoning is: Telegraph Rights = Broadcasting + Telecasting Rights = No Interstate Commerce = Immunity.

The Court of Appeals below adopted Judge Chase's words and stated: "* * * the sale of broadcasting rights for radio and television" is "not different in any essential form from the sale of the rights of descriptions of games over telegraph wires in the Federal Baseball Club case" (R. 20).

The question for determination is narrowed to that extent.

We respectfully submit that this Court has for determination the defense of absolute immunity by Organized

Baseball. Their contention is this in substance:

> That whatever advance science has made or will make in the direct transmission of the sights and sounds of the game through radio and television, whatever millions of viewers and listeners and wherever situated, that the defendants are immune from the Sherman and Clayton Acts; even though they obtain millions of dollars by selling these rights and use them for advertising of products manufactured and sold in interstate commerce.
>
> That if 69 millions of people view the games or listen to them as played—in addition to those in the baseball park—that the games are "local" and defendants immune.

The question becomes two-pronged:

1. Do the broadcast and telecast count, in the sense of interstate commerce, if almost one-half of the population of the country listen to or view the games as they are played? Degree is irrelevant, they say.

2. Does the receipt of millions of dollars for the broadcast and telecast rights and other activities related to them, and the control of the same by the respondents, equal the telegraph situation found in the *Federal Baseball Club* case—and thus mean nothing in an interstate commerce sense?

The defendants again say this means nothing. The degree of money involved, they say, is irrelevant.

Those are the real issues. To state them is to bring forth the answer. Surely, the amount of people and money involved affect this matter, and color the whole.

Congressional Finding on Issue Presented

Subcommittee of the Committee on the Judiciary of the House of Representatives believed that organized professional baseball is not beyond the Federal jurisdiction. This belief is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar. On page seven of the Report of The Subcommittee on Study of Monopoly Power of The Committee on The Judiciary, House of Representatives, 82nd Congress, Second Session (hereinafter referred to as the "Report"), it is stated:

> "After full review of all of the foregoing facts and with due consideration of modern judicial interpretation of the scope of the commerec clause, it is the studied judgment of the Subcommittee on the Study of Monopoly Power that the Congress has jurisdiction to investigate and legislate on the subject of professional baseball."

The Second Circuit has ruled that Baseball is Interstate Commerce. *Gardella* v. *Chandler* (172 F. 2d 402, Feb. 9, 1949). The sole reason for the dismissal of the case at bar was the lack of jurisdiction over professional baseball. In the *Gardella* case, Judge Hand stated that television created the same indivisible unit between the players and the spectators as exists between actors and audience in a theatre, and that the situation was the same as though a state boundary ran between the grandstand and the foul line. However, he took the view that issues of fact existed. The income from this novel source with other interstate activities had to be sufficient to color the whole with an interstate character. Judge Frank adopted the position that it was sufficient to prove that the income from radio and television was substantial. *Martin* v. *National League Baseball Club*, 174 F. 2d 917 (2 Cir.), explained

these divergent views in *Gardella. Fisher's Blend Station* v. *Tax Com'n*, 297 U. S. 650, cited upon the original *Gardella* appeal had previously upheld the principle that the transmission of communication through a mechanism within the exclusive regulatory power of Congress was interstate commerce in contrast to unaided human vision across a state boundary resulting simply from the mere extension of land (*id.*, 655).

Effect of Radio and Television on Attendance

The *Martin* and *Gardella* cases antedated by two years the investigation of Organized Baseball by Congress. Although the circumstances were not touched upon either at the Hearings or in the Report, the television system by 1951 had been completed or virtually completed from coast to coast. Its effect is sharply accentuated by the data prepared by the Subcommittee. Whereas in 1950, the paid attendance for Major League games during the season was 17,462,977 and in 1951, 16,213,626, with the respective totals 17,705,113 and 16,607,678 arising from greater attendance at the All Star and World Series games in the later year, the seasonal Minor League attendance dropped from an estimated 34,533,000 in 1950 to 27,519,000 in 1951 (Hearings, 1616). Meanwhile the receipts of the Major League clubs for radio and television increased from $3,365,500 in 1950, 10.5% of their total revenue, to $4,561,312.50 as a minimum (Report 6). The total attendance for the Major and Minor Leagues of 52,238,000 in 1950 declined to 44,127,000 in 1951. Thus, while Major League receipts from radio and television went up between seasons by over 33⅓%, Minor League attendance dropped by approximately 20%. The difference was made up by telecast and radio audiences. We thus have a legislative finding upon an exhaustive review of the facts underlying the present administration of Organized Baseball to show that defendants are substantially engaged in interstate commerce.

The Report states (p. 12): "Mutual Broadcasting System estimated that 69,000,000 persons in the United States listened to one or more of the 1951 World Series games (Sporting News, October 31, 1951, p. 21)."

Wire Service of No Significance

The Court of Appeals for the Sixth Circuit in the case at bar relied upon the decision of this Court rendered in the *Federal Baseball Club* case of 1922. This decision was made many years before radio and television provided any income whatsoever for Organized Baseball. In 1929, while this condition still existed (Report, 6), The National League and The American League received the respective sums of $20,614.22 each from their separate contracts with the Western Union Telegraph Company (Hearings, 1327, 1411). Apparently these sums were never exceeded (Ibid., 1339, 1425). Unlike radio and television, this wire service was not a source of competition on the part of industrial or commercial advertisers. The *Federal Baseball Club* Record on Appeal, ff. 442-447, shows that this service was the source of $18,000 for The National League from 1913 to 1917, inclusive, and never ran to any individual club. Under these circumstances, it is impossible to add to the cogency of Judge Hand's disregard of this factor in *Gardella, supra;* particularly, when, as he points out, it was never mentioned by Mr. Justice Holmes. Furthermore, counsel for the Leagues in 1922 did not consider that the wire service involved the question as to the effect of the direct transmission of the sights and sounds of the game by diffusion from a central source. Had wire service been considered operative, the resourceful counsel for the Leagues would not have admitted that the transmission over wire from a central source, of the sights and sounds of the game, might perhaps have meant interstate commerce under *International Textbook Company* v. *Pigg*, 217 U. S. 91 (Brief of defendants in error, pp. 52-53).

The wire service rarely did more than transmit inning by inning scores, with occasional play by play accounts of the games for extremely important games upon which a pennant race might have or seemingly depended. The striking differentiation between radio and television and the wire service is that the latter was at no time the subject for special payments to The National Commission for the World Series. The television and radio revenue alone for the World Series amounted to $1,075,000 for 1951, while the All Star Game produced radio and television revenue of $110,000. The dissemination to private customers of the wire service of Western Union could not possibly compare in any commercial sense with the power Organized Baseball and the Major League club owners now have over the buyers' market throughout the United States and beyond her borders. The wire service was not the subject of competition, including that of ownership of the club franchises, by manufacturers of beer, and other products.

Growth and Propaganda

The Major League owners are now in monopolistic control over a rapidly growing domain of industrial advertising. They control many of the Minor Leagues and their clubs. The Commissioner owes his reelection every seven years to the vote of 12, or 75%, of their number. They dictate how the reserve clause and the intricate provisions related to it must be construed and enforced. Congress has pertinently refused with all of the myriad facts intertwined in the conduct of the modern game before it, to grant Organzied Baseball the legislative immunity sought in the wake of the *Gardella* case from the anti-monopoly statutes (Report, 230).

If the *Federal Baseball Club* case, nevertheless, remains the law of the land, Congress is in the anomalous position

of being able to regulate radio and television while it cannot regulate in any form or manner the business of any of the defendants, when they are concerned directly with the dissemination of sporting exhibitions over the self same media. It has been said, and may appear as the real reason for the reluctance of the Court below to take jurisdiction over the case at bar, that baseball is the national pastime; that it is loved by all in this country; that the players are revered; that to regulate the game and take jurisdiction might defeat the game.

These propositions are merely propaganda put out by the defendants to avoid the controls that Congress deemed necessary over sixty years ago for the regulation of monopolies, and which have now been specifically found wise to apply to Organized Baseball. Petitioners show a glaring instance of the misapplication of the reserve clause in contradiction to concepts deemed applicable and proper even by the respondents in the *Federal Baseball Club* case. (See, Brief of defendants in error, p. 22). Further, the Constitution of Mexico in its heroic effort to blot out any form of peonage through Article 5 had apparently rendered the right of reservation invalid within her jurisdiction. Organized Baseball has remained heedless to the significance of that result. And has extended it.

A. Emotional Argument

The respondents have running in their favor propaganda designed to arouse the emotions. This is, that (a) baseball is the national pastime, (b) this Court must be sympathetic, and permit them to operate as they have, and extend their operations on pain of "ruining the game". Respondents went to Congress for immunity legislation, which was denied. On this score, many famous New York sports writers, ordinarily inclined to be favorable to baseball as a game, have denounced the respondents and their practices, stating that they should have reformed them long ago ("Red" Smith, The New York Herald Tribune—

Late City Ed.—May 27, 1953, p. 24, cols. 7-8; The Powerhouse by Jimmy Powers, The News, Sports Section, August 3, 1949, August 26, 1949; Dan Parker, Daily Mirror, Sunday, October 14, 1951, p. 15, cols. 1-2). Philip K. Wrigley, President of The Chicago Cubs, holds the same views (The Sporting News, August 26, 1953, front page, lower half).

Former Senator Pepper put it correctly in his book, that the owners wanted the players regulated, but not their own activities, and he had to put them into declarations of sworn faith of fair play. He recognized them as in a public trust (Pepper, Philadelphia Lawyer, p. 358). The Nation has asserted that the players understand the oppressiveness of the contractual structure (August 11, 1951, p. 103; see, also, Report, 186).

We submit that the test of the activities of respondents is, has Congress given them immunity and privileges for these activities? The activities and the extension thereof do not create immunities.

The emotional approach of the respondents has the unwritten but implied suggestion that they are sporting gentlemen; that, though interested in many instances in commercial products advertising through the sights and sounds of the game, they should be given a judicial immunity as benevolent despots and rule makers. This country has been said to be dedicated to the proposition of being a government of laws and not of men.

However benevolent the respondents or their successors might be, however wise its commissioner and overlord, this does not make or create for them immunities. Even a wise president, or an enlightened congress cannot claim such exceptions above law in our history to this date. This small segment of business men with their selfish ends to pursue surely do not possess the dispensing power. All recognize they have and can have profit as their goal. Economic goal is no disgrace. That baseball is the means

to that end or the means to advertise their other enterprises, does not wrap them with the halo or put them beyond the law. We do not wish to destroy baseball. Petitioners have done nothing toward that destruction. Respondents could easily clean house and rid themselves of illegality if they elected to do so. How that can be done is plain to all; but being stubborn men they would rather have legislative immunity, and since that cannot be obtained—as it has not—have the judiciary pose exceptions. (See *United States* v. *Paramount Pictures*, 334 U. S. 131, 174.)

Extension of Monopoly by Farm System

A farm system is a chain of minor league clubs owned or controlled by a major league club. Such a system operated for profit or for training directly affects the players in their profession. They afford the Major League clubs the power of keeping the players for many years in an apprenticeship status. They are unilateral channels stretching into many states and into international areas.

In this connection the facility with which television has been brought within the last few years into the Minor League cities threatens seriously to destroy the Minor Leagues as a result of the preference on the part of the fans to watch Major League games over television. The Senate, however, has so far failed to act on the bill [S. 1396] introduced by Senator Edwin C. Johnson of Colorado, President of the Western League. The Report accompanying this bill was submitted to the 83rd Congress, 1st Session, Calendar No. 389, Senate Report No. 387. In its conclusion, this report states in part (12):

> "The minor league baseball clubs comprise the backbone of small business in the baseball industry. Minor league baseball clubs are the keystone of the entire baseball structure; without the minor leagues this structure will collapse."

A. The "Nutcracker"

It has been pointed out that there are 16 Major League Clubs in control of Organized Baseball. There were 319 Minor League Clubs at the end of 1952, all beholden to the Majors and the rules laid down by them; and of the 319 Minor League Clubs the majors controlled or owned 175 through chain store or farm technique. Petitioners had not been within the latter group, but were independent, falling within the classification of those described in the report on the Senator Johnson bill:

> "The minor league baseball clubs comprise the backbone of small business in the baseball industry."

The Johnson bill was introduced in an attempt to limit the destruction of the small business, or what was left of it. The televising and broadcasting of major league games into the areas of minor league markets, reduced the interest of the population in the minor leagues. In place of attending home town games, the people were and are now taking their baseball as well as their culture, at home, or in bars and restaurants. They prefer major league sights and sounds to personal attendance at the minors.

The petitioners faced with the farm and chain situation, in which the majors financed, owned and controlled the immediate competitors of the small minor league owner, were also faced with the loss of patronage to major league play over radio and television. In that state of affairs, it was proper for them to conceive the idea of gaining patronage from the Mexican population of Texas. To do this they conceived that signing good Mexican players, then free of any obligation to any one else here or in Mexico, would serve a twofold purpose. First, it would give petitioners an economic opportunity to gain new interest and followers; secondly, Mexico, being baseball minded, and bordering El Paso, was a potential source for

radio patronage of the team. With Mexican players making good in this minor league town, and being trained and assigned to the majors, other Mexican boys would welcome opportunities to play for this team. Broadcasts could then be arranged into Mexico. Sponsors obtained. All tending to the eventual success of the operation without selling out the franchise to the Majors as a chain or farm.

This was legitimate and proper. It was blocked by the respondents. Respondents had made the secret Mexican agreement, which did not permit anyone in baseball to sign a Mexican player. Petitioners were not inducing a breach of any contract or negotiating with players who were under contract with any team, if that circumstance be material. They attempted to negotiate and bring over Mexican players qualified to play and not under any contract. For this they were blacklisted, fined and punished; and the Mexican players lost their opportunity to play; the broadcasting could not materialize; the Texas Mexicans were left without their opportunity to root for and support these players. Petitioners were therefore placed in the nutcracker.

B. Queries as to Respondents' Pressures

Having been subjected to the iron-clad monopoly of Organized Baseball and having been subjected to its competition by the broadcast and telecast of Major League and other games, why cannot petitioners sign and field players of Mexican nationality, not otherwise disabled or disqualified to play professional baseball?

Further, the Major Leagues and their farms having signed and fielded players of South American, Cuban and Canadian origin, petitioners invite the respondents to give any valid reason why they have not been given the similar right to sign and field Mexican nationals.

Petitioners invite the respondents to show this Court why they have prevented the broadcast and potential telecast of petitioners' games into Mexico and the use of Mexican personnel to build up such interest and market.

Why petitioners must stand by and take passively the competition by Organized Baseball of farming and broadcast and telecast; and stand punishment and discipline for their effort to protect their economic interest by signing players and obtaining new and potential markets of interested spectators and fans, both seen and unseen.

Respondents' Arguments by Confession and Avoidance Are Untenable

Taking up the respondents certiorari argument to this Court in opposition to petitioners' application, it was there claimed that:

1. Respondents confessed but avoided, asserting *in pari delicto*.

This made the petitioners not only the subject and object of the illegal acts, but made them also victims of the perpetual peonage that respondents would like to continue, both over the players and the remaining minor league owners.

What circumstances are real? These:

(a) El Paso franchise was small business.

(b) Negotiations with real Mexican players.

(c) The secret Chandler agreement.

(d) The punishment and discipline of petitioners.

(e) Mexican decision declaring the secret agreement peonage.

(f) The Mexican interest in baseball; the Mexican population in Texas.

(g) The right and economic privilege of petitioners to obtain access to such market.

(h) The farm system and control by the majors and financing of these in competition to small business.

(i) The growth of the broadcast and television into minor league areas, resulting in the Johnson bill proposal.

(j) The privilege of assigning existing player contracts to other teams for a price.

(k) The privilege of assigning players without any contract to other teams for a price.

All of these circumstances exist and are not the product of anyone's imagination. Respondents confess them, but seek to avoid because, under their self-made rules, the Mexican players might have been at some future time disposed of by petitioners under (k). The repudiation of (k) (*supra*) by petitioners, the prevention of their ever reaching this situation, is said nevertheless to put them *in pari delicto* with these respondents. It is not the fact that petitioner used the reserve clause; and were it the fact, surely as small business, they cannot be made the victims of every practice of monopoly, and at the same time be said to be willing parties (*Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211).

For further illustration of the nutcracker argument, let us call the Major Leagues numbers 1-16; the Minors 17-319. If 1-16 directly own 17-175; if they apply economic pressures by this ownership, to compete with the remaining Minor League clubs by financing their farms, and by broadcasting and telecasting their games into all of the areas; if further they obtain a growing cartel by the

reserve clause over all manpower playing baseball, and continue this cartel by agreements with independent Leagues within the United States, and outside of the United States (Peter S. Craig, Monopsony in Manpower: Organized Baseball Meets the Anti-trust Laws, 62 Yale Law Journal 576, 606; Hearings, 1299-1301) can it be said that one of the clubs in a lower Minor League, objecting to these practices, and pursuing legitimate economic goals, is *in pari delicto*? Respondents want the line drawn at infinity—broadcasting and telecasting equal wire service; cartels created and expanded over the manpower brook no interference by player or small business owner, or by the United States government or any other government, single or in combination. That is what they ask this Court to hold. We submit that the interest of justice, baseball and the public interest do not require this, but the very opposite (*Gardella* v. *Chandler*, 172 F 2d 402 at pp. 409-410. Frank, J.).

2. Respondents claim a confession and avoidance under subsection (a) (2) of section 13 of the Norris-LaGuardia Act (29 U. S. C., 113 (a) (2)). No reference was made to this contention by the Court below.

(a) Legislative Intent: Norris-LaGuardia Act

Up to the passage of the Sherman Act we may assume that employers could organize, monopolize and preempt the interstate and international market by every practice available. Employees could not combine or "conspire" under the Sherman Act. (*United States* v. *Debs*, 64 Fed. 724, 754-755.) The Clayton Act failed to give employees relief.

The contention that the Norris-LaGuardia Act has worked an exemption for Organized Baseball from the Sherman and Clayton Acts would entail the conclusion that the reserve clause is entirely free from Federal regulation of any kind. In *United States* v. *Hutcheson*,

312 U. S. 219, the crux of the opinion is the acceptance by the Supreme Court of the following statement in the Report of the House Committee on the Judiciary as authoritative (236):

> "'The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, (38 Stat. 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.' (House Rep. No. 669, 72nd Congress, 1st Session, p. 3)."

The Court thereupon explains that the object of the Norris-LaGuardia Act was to include within the exemptions of § 20 of the Clayton Act the secondary boycott and other labor union activities, as redefined by the Norris-LaGuardia Act. The Court continued (*ibid.*):

> "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later act. In this light § 20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law."

If inconsistency in phraseology exists between section 4 of the Clayton Act and the Norris-LaGuardia Act, the well known object of this later measure demands unequivocally the application of the rule of construction that the judiciary may properly use the legislative history to reach a conclusion when the literal words of the statute would bring about an end completely at variance with its purpose (*U. S.* v. *Public Utilities Comm'n.*, 345 U. S. 295, 315, and au-

thorities cited therein). The Norris-LaGuardia Act was a legislative disapproval of *Duplex Co.* v. *Deering*, 254 U. S. 443, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Ass'n*, 274 U. S. 37. The adjudicated purpose of Congress in passing the Norris-LaGuardia Act was to place an authoritative interpretation upon section 20 of the Clayton Act by immunizing trade union activities as redefined by the later Act (*United States* v. *Hutcheson*, 312 U. S., *supra*, 236; see also, 6 Corbin on Contracts, p. 1400, p. 561). Organized Baseball was given no immunity (Monopsony In Manpower, 62 Yale Law Journal, *supra*, 613-621).

The contention of Organized Baseball acts as a sword against the players, and amounts to a claim that the Sherman Law, the Clayton Act and the Norris-La Guardia Act supply this instrument for imposing restraints upon professional athletes. This reminds of involuntary servitude, if it is not the equivalent thereof (cf. Mr. Justice Brandeis and Mr. Justice Holmes dissenting, *Bedford Cut Stone Co.* v. *Journeyman's Stone Cutters Assn.*, 274 U. S., *supra*, 65). *Anderson* v. *Shipowners Assn.*, 272 U. S. 359 was not unwittingly overruled by Congress at the instigation of Representative La Guardia to deprive the unorganized professional when under unreasonable restraint, of his action for treble damages. (See Note on *Gardella* v. *Chandler*, 62 Harvard Law Review, 1240, 1242). This conclusion is axiomatic in regard to professional baseball players. In 1925, Congressman La Guardia had introduced a bill in the House (H. R. 12102, 69th Congress, 1st Sess., 66 Cong. Rec. 2907; New York Times, February 3, 1925, p. 26, col. 2), to tax the sales by organized baseball of these players in amounts above $5,000 at 90% (Monopsony in Man Power, 62 Yale Law Journal, *supra*, 635).

Repeal by implication is not favored; particularly, when the construction would defeat the policy of Congress and raise grave issues of constitutionality.

(b) The Fourteenth Amendment and the Sherman Act

The Fourteenth Amendment protects the right of the individual professional man or worker to go from State to State in the pursuit of his livelihood in accordance with the commerce clause (*Edwards* v. *California*, 314 U. S. 160); and likewise in the enjoyment of his privileges and immunities as a citizen of the United States (*id.*, 178, 184). The same protection is afforded to an alien lawfully within the United States (*id.*; *Truax* v. *Raich*, 239 U. S. 33).

Under these circumstances, a construction of the Sherman, Clayton and Norris-La Guardia Acts to deprive petitioners of their treble damage action would unnecessarily raise grave constitutional issues. In relation to the Fourteenth Amendment and as to the interpretation of sections 55 and 56 of the Charter of the United Nations, this proposed construction would disclose the failure of Congress to implement these treaty obligations to preserve the intent of the Fourteenth Amendment and the history and adjudicated intent of the Sherman Act (*Anderson* v. *Shipowners Assn.*, *supra*, 272 U. S. 359; *Associated Press* v. *United States*, 326 U. S. 1, 19; *United States* v. *Addystone Pipe & Steel Co.*, 85 Fed. 271, 279).

Senator John Sherman regarded the Fourteenth Amendment as an incorporation of the Civil Rights Act of 1866 (14 Stat. 27). In the Congressional campaign of 1866, he declared before a large audience at Cincinnati (Cincinnati Commercial, Sept. 29, 1866, p. 1, col. 4):

> "The first section (of the proposed Amendment) was an embodiment of the Civil Rights Bill, namely: that everybody—man, woman and child—without regard to color, should have equal rights before the law; that is all there is to it; that every body born in this

country or naturalized by our laws should stand equal before the laws—should have the right to go from county to county, and from State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause. * * *"

This accords with the later judicial interpretation of the Sherman Anti-Trust Law and the Clayton Act to protect the individual. This was anticipated in the original judicial readings of the Fourteenth Amendment. In his dissenting opinion in the *Slaughter-House Cases*, 16 Wall. 36, 83, Mr. Justice Field reviewed the apposite precedents and asserted (109-110):

"In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States."

Mr. Justice Bradley in his dissent in that case stated a similar conclusion (*ibid.*, 113-114). Both of these dissenting opinions were referred to in *United States* v. *Underwriters Assn.*, 322 U. S. 533, 553, Note 39, in connection with the circumstance that for twenty-five years preceding the adoption of the Sherman Law, trusts and monopolies were the terror of the period. During this interval, general acts of incorporation by the state legislatures had eliminated the special act as a medium for corporate monopolization (Senator Stewart, in the debate on

the Sherman Law, March 25, 1890, 51st Cong. 1st Sess. 2606; Gerard Carl Henderson, The Position Of Foreign Corporations In American Constitutional Law, 69 and note). By contrast, the individual worker confronted by a "trust" was helpless. Senator Sherman observed as to the power of such a monopoly (21 Congressional Record, 2457):

> "* * * (I)t commands the price of labor without fear of strikes, for in its field it allows no competitors. * * *
>
> 'If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities * * *.'"

(Quoted in part in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 428 Footnote.)

Double Nutcracker

The ultimate position of Organized Baseball in these matters on the certiorari application devoloped that:

(a) The Minor League Club owner was a victim of monopoly;

(b) Therefore, he could not bring Mexican players into his fold or any other players;

(c) Therefore he had to follow blindly any order, blacklist or punishment.

As to the Mexican player:

(a) He is prevented from coming into the United States to play baseball of his own volition (Report, 82-83).

As to the American player by the reserve clause:

(a) He is forbidden to cross state lines to go to Mexico or anywhere else to practice his profession;

(b) To make television or radio appearances concerning his profession, except by permission of his club (Hearings, 1249, 1256).

It should be noted that the Minor League player is subject to discharge or the termination of his contract without notice and that under the tampering rule, he is forbidden, prior thereto, to negotiate with another club (Report, 119, 138-139); a situation, that with other elements (eg. Report 126) renders unionization a practical impossibility (John W. Neville, Baseball and The Antitrust Laws, 16 Fordham Law Review, 208; Organized Baseball And The Law, 46 Yale Law Journal, 1386;

As to the Major Leagues:

(a) They can control, operate, blacklist and make any rule governing any Minor League Club or player through the reserve clause and the cartel system;

(b) They nevertheless claim that the Norris-LaGuardia Act grants to Organized Baseball by implication the repeal of the Sherman and Clayton Act, and gives them license to draw the line anywhere they choose.

A player's professional span is 6.3 years in the Majors. (Hearings, 868, 869). There are many other professional sport activities: football, hockey, basketball, tennis, dogs, racing. All are organized. They desire the same immunity as Organized Baseball for the same reasons. After *Gardella, supra,* they sought express immunity, which was denied (Hearings, 385, 1454, *et seq.;* 1504-1505). The players of the games in professional tennis, football, hockey, basketball, soccer and the like are threatened

with the same abuses. To organize is no answer to them, for (a) the professional span is small, (b) the time of opportunity is of the essence the key to emolument and advancement, (c) the players are in competition with each other. Therefore to force these independent young men, to organize would defeat their own economic advantage. No professional field organizes where the professionals compete with each other. Congress by the Norris-Laguardia Act gave some additional rights and privileges. But thereby it did not take other rights and privileges and the remedies of the Sherman and Clayton Acts against those interfering illegally with their professional advancement.

When petitioners signed the Mexican players they were pursuing legitimate economic activities, as were the professional players. Congress did not intend the Norris-LaGuardia Act to give anyone the immunity to interfere with these pursuits by monopoly.

Respondents would set up invidious classifications: of dogs, horses, doctors, lawyers, baseball players, football players and lead to absurdity. (Monoponsony In Manpower, 62 Yale Law Journal, *supra*, 619-620.)

Intention Leading to Probable Unconstitutionality Not to Be Ascribed to Congress

No rule of judicial or of statutory construction or the failure of the Department of Justice to protect the players gives Organized Baseball an immunity from national regulation under the Sherman Act. (*Times-Picayune* v. *United States, supra,* 345 U. S. 594, 623-624; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 225-228.)

If the reserve clause has been made immune from the Sherman Law by the Norris-La Guardia Act or kindred legislation in an alleged and unconsidered repeal of the

interpretation made in *Anderson* v. *Shipowners Assn.*, *supra*, 272 U. S. 359, the policy of the United States has clearly been set at naught (*United States* v. *Gaskin*, 320 U. S. 527; Frank, J., in *Gardella* v. *Chandler*, *supra*, 409, and authorities cited at note 3).

The judicially unenforceable reserve clause together with the illusory Minor League contract (see *Strobe* v. *Netherland Co., Inc.*, 245 App. Div. [N. Y.] 573, 578) has no semblance of validity under state laws (cf. Mr. Justice Trimble, concurring, in *Ogden* v. *Sanders*, 12 Wheat. 213, 313, 319-320). After the House has refused to initiate a measure to free Baseball from the principles of *laissez faire* (cf. *Sunshine Coal Co.* v. *Adkins*, 310 U. S., 381, 396) and the Senate has failed to act on a comparable measure involving broadcasting,[1] the interpretation sought by respondents raises a grave constitutional issue. Particularly is this so in rescept of the constitutional and common law guarantees of individual economic freedom implemented internationally by the United States treaty obligations under sections 55 and 56 of the Charter of the United Nations. (*Dred Scott* v. *Sandford*, 19 How. (60 U. S.) 393; Charles Warren's Book Review of "Treaties and Constitutional Law: Property Interference and Due Process of Law," by Willard Bernice Cowles, 36 American Journal of International Law 343).

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[1] If this Court should reaffirm *Federal League Club* v. *National League*, 259 U. S. 200, the Major Leagues of Organized Baseball may again regulate broadcasting and telecasting under former Major League Rule 1 (d) which was rescinded as the direct result of the serious objections raised by the Department of Justice under its interpretation of the Sherman Law (Senate Report 387, to accompany S. 1396, 83 Congress, 1st Session; see also Broadcasting Telecasting [The Newsweekly of Radio and Television], February 25, 1952, p. 27).

Conclusion

The amended complaint sets forth the formation of a cartel in man power between Organized Baseball and the Mexican League (*Timken Co.* v. *United States*, 341 U. S. 593), to plaintiffs' damage. The investigation by the Congressional Subcommittee disclosed similar agreements with independent Leagues within and without the United States (Peter S. Craig, Monopsony in Man Power: Organized Baseball Meets the Antitrust Laws, 62 Yale Law Journal, *supra*, 606; Hearings 1299-1301).

Plaintiffs were deprived by the Mexican Agreement of the opportunities for the mutual performance of profitable contracts with the Mexican players. Such loss of opportunity, even in the absence of negotiated contracts, raises a triable issue under section 4 of the Clayton Act (15 U. S. C. A. Sec. 15; L. Hand, J., for the unanimous Court in *Vines* v. *General Outdoor Advertising Co.*, 2 Cir., 171 F. 2d 487, 491, and authorities cited). Plaintiffs have sufficiently alleged the source of their injuries pursuant to the anti-monopoly statutes (*Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251; *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390). In *Fleitman* v. *Welsbach*, 240 U. S. 27, and like cases cited by respondents, the corporation did not join the stockholder in a treble damage action. Petitioner Corbett had the right to carry on business through the corporate petitioner (*United States* v. *Underwriters Assn.*, 322 U. S., *supra*, 546; *Jordan* v. *Fashiro*, 278 U. S. 123, 127-128).

Respondents have not denied that plaintiff Corbett was disciplined for offering employment to Mexican players in accordance with their rights as defined by the one pertinent decision, from which no appeal was taken, in an apposite interpretation of the Mexican Constitution. This

result is in harmony with the construction of the antitrust laws in *Anderson* v. *Shipowners Association, supra,* 272 U. S. 359.

As the jurisdictional point alone was decided below, it is respectfully submitted that the Court erred. The judgment and order should be remanded.

Respectfully submitted,

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